COMMONWEALTH OF MASSACHUSETTS
before the
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Western Massachusetts Electric Company	)	**D.T.E. 00-33**
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REPLY BRIEF OF THE ATTORNEY GENERAL

Respectfully submitted,

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I. INTRODUCTION

Pursuant to the procedural schedule adopted by the Hearing Officer, the Attorney General files this Reply Brief for the limited purpose of responding to certain positions taken in the Initial Brief filed by Western Massachusetts Electric Company ("WMECo") in this proceeding. This Reply Brief is not intended to respond to every argument made or position taken by the Company. Rather, it is intended to respond only to the extent necessary to assist the Department of Telecommunications and Energy ("Department") in its deliberations, *i.e.*, to provide further information, to correct misstatements or misinterpretations, or to provide omitted context. Therefore, silence in regard to any particular argument, assertions of fact, or statement of position in the Company's Initial Brief should not be interpreted, construed, or treated as assent, acquiescence, or agreement with such argument, assertion, or position.

For the reasons set forth below as well as those in his Initial Brief, the Attorney General submits that the Department should find, *inter alia*, that the Company's proposal (1) fails to reconcile FAS 106 and FAS 87 costs consistent with the Department's Order in D.T.E. 97-120, and (2) fails to return to its customers all of the benefits of ownership, operation and divestiture of its generation assets, including investment tax credits and margins from wholesale generation sales, as required by G. L. c. 164, §§ 1-2 ("the Restructuring Act").

II. ARGUMENT

A. STANDARD OF REVIEW

The Company seeks a lower standard of review than the Department has been applied to the transition charge reconciliation reviews of other Massachusetts utilities. It is attempting to use the Department's desire for finality in the resolution of issues to preclude meaningful review of the costs it now seeks to flow through the transition charge. It's basic argument is that since the Department reviewed the "universe of restructuring issues" in D.T.E. 97-120, "to an unprecedented degree," the scope of this proceeding is essentially "limited" to checking the Company's math.[1] Co. Br., pp. 4-5. WMECo claims that "the Attorney General urges the Department to adopt a wildly expansive and improper standard of review in this proceeding" which "would require a relitigation of the transition cost issues finalized in D.T.E. 97-120." Co. Br., p. 5. However, a review of the Attorney General's Brief

[1] As recently stated by the Department in the context of its ability to revisit reconciling mechanisms to prevent financial windfalls: "Ratesetting is not MONOPOLY®. The Department's Order . . . is not a 'Community Chest' card reading 'Bank error in your favor. Collect [hundreds of thousands of dollars] from [consumers].'" *Fitchburg Gas and Electric Light Company*, D.T.E. 99-66, p. 27 (2001).

will demonstrate that he has only requested the same standard of review utilized by the Department in other transition charge reconciliation proceedings. *See Boston Edison Company*, D.T.E. 98-111, p. 4 (1999); *Boston Edison Company*, 99-107-A (Phase II), pp. 2-3 (2001). The Department must review the filings to ensure that the proposed reconciliations are consistent with or substantially comply with the Restructuring Act, the Company's approved restructuring plan, applicable law, and Department precedent. *Boston Edison Company*, D.T.E. 99-107 (Phase II), p. 4 (1999). Nothing in the Restructuring Act can be construed as relieving the Company of its duty to prove, by substantial evidence, compliance with these requirements in the reconciliation filings.

The Department should disregard WMECo's puffing and review the Company's filing in a manner consistent with its review of similar filings made by other companies.[2] WMECo, the company with the highest transition charge under the Restructuring Act, should not receive more favorable treatment on issues than has been afforded other utilities in the Commonwealth.

B. FAS 106 TRANSITION OBLIGATION

1. THE COMPANY'S ARGUMENTS ARE NOT SUPPORTED BY THE RECORD

The Company's makes several statements that are not supported by the record:

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[2] Further understanding of the reasons behind the Company's attempt to prevent Department review of certain issues is found in footnote 2 of the Company's Brief, which references the Madison and other wholesale contracts. Co. Br., p. 6. WMECo has raised the claim of relitigation in order to avoid the application of Department precedent. Since WMECo has included costs related to its wholesale power transactions in the Transition Charge, so too must the revenue attributable to those contracts be included in the transition charge. *Boston Edison Company,* D.T.E. 99-107-A (Phase II) pp. 6-8. If WMECo's customers were "completely isolated" from these contracts as the Company claims, then why are the costs included in the transition charge? Co. Br., p. 37. If these costs are transition costs, then Department precedent requires all the costs and the revenues to be reconciled in the transition charge.

(1) The Attorney General relied on something other than an actuarial study in calculating the FAS 106 reconciliation;
(2) The Attorney General is seeking to "siphon off millions of dollars from the unrecognized gain" so that this "raid" on the gain "can be immediately credited to customers";
(3) The Attorney General's reconciliation will lead to volatility in the future; and,
(4) the allocation of the NUSCO gain should not be included in the reconciliation.

Co. Br., pp.12-16.

WMECo argues that Mr. Effron, in quantifying his FAS 106 reconciliation adjustment, "made no attempt to take into account the actuarial inputs required by the Department." Co. Br., p. 12. However, the Department made its requirements regarding such "actuarial inputs" abundantly clear: "At the time of each divestiture, WMECo shall reconcile the FAS 106 balance for the appropriate share of the unrecognized transition obligation, unrecognized prior service cost and unrecognized gains or losses associated with the FAS 106 obligation." D.T.E. 97-120, p. 66. A review of the record demonstrates that Mr. Effron precisely followed the Department's methodology in calculating his FAS 106 reconciliation adjustment. Exh. AG-1, pp. 11-12. In fact, the Department's directive, and Mr. Effron's calculation, exactly parallel the line items in the "Reconciliation of Funded Status" of the FAS 106 obligation, or actuarial study. Ironically, this is the same actuarial study relied on by the Company. The difference is that while Mr. Effron followed the explicit directives of the Department, the Company rejected the Department directive in D.T.E. 97-120 and created its own FAS 106 reconciliation adjustment. WMECo has ignored the Department's order to "reconcile the FAS 106 balance." While WMECo's proposed adjustment might be derived, albeit indirectly, from an actuarial study, it does not reconcile the FAS 106 balance.

The Company Brief also describes Mr. Effron's proposed FAS 106 reconciliation adjustment as “siphoning off millions of dollars from the unrecognized gain in an actuarially improper fashion” Co. Br., p.13. Mr. Effron proposes no such thing. The reconciliation adjustment is nothing more than proper accounting treatment of the unrecognized gains related to the FAS 106 obligation that the Department has required of other Massachusetts companies. The Department has previously rejected the Company’s position that such accounting recognition would entail any raid on the Company’s funds. D.T.E. 97-120, p. 71.

The Company’s assertion that the Attorney General has assumed that “the FAS 106 unrecognized gain can be immediately credited to customers”is similarly without foundation. Co. Br., pp. 14-15. The Attorney General has proposed that the reconciliation adjustment be credited against the FAS 106 transition obligation, thus flowing the credit to customers over the remaining life of the transition charge. Exh. AG-1, pp. 10-11. Therefore, there is no basis for the Company’s characterization of this position as being a proposal for an immediate credit to customers.

The Company also contends that reconciling the unrecognized gain at this time will lead to volatility in the future. Co. Br., p. 13. This claim too is unsupported by the record. The reconciliation at this time reduces the FAS 106 transition obligation recovered through the transition charge. That recovery will not fluctuate in the future because of the reconciliation at the present.

Finally, the Company argues that NUSCo’s employees cannot be specifically traced to generation divestiture and therefore, it is improper to include the allocation of their gains to reduce transition costs. Co. Br., p. 13. The Attorney General has already addressed the Company’s characterization of the reconciliation of the NUSCo FAS106 transition obligation as an application of “phantom savings.” AG Br., pp. 9-10. WMECo neglects to explain how Mr. Effron’s proposed adjustment of $600,000 magically transforms into "millions of dollars." Co. Br., p. 13. The NUSCo FAS106 transition obligation is included in the transition charge; therefore, it must be reconciled for any "unrecognized gains or losses" existing at the time of divestiture.

2. THE COMPANY HAS RECOGNIZED THE PROPRIETY OF THE ATTORNEY GENERAL'S PROPOSED RECONCILIATION ADJUSTMENT

The Company itself has actually proposed a reconciliation adjustment in this case that is quite similar to Mr. Effron's. In response to Record Request HD-02, Q-DTE-12, WMECO presented two alternative calculations to reconcile the FAS 106 Transition Obligation. In the cover sheet to this response WMECO states: "The Company believes that if the Commission [sic] decides that it is proper to recognize a portion of the unrecognized gain in the Transition Charge calculation, then Scenario 2 would properly accomplish such an allocation." Of course, the Department has, in fact, already decided that it is proper to recognize a portion of the unrecognized gain in the Transition Charge calculation. This decision can be found in the Department's September 17, 1999 order in D.T.E. 97-120, at page 66, cited above. It is clear from the response that the Company recognizes that "Scenario 2" properly accomplishes the reconciliation for the "unrecognized gains or losses associated with the FAS 106 obligation" referred by the Department in its September 17, 1999 order.

The "Scenario 2" calculation provided by the Company in the response to Record Request HD-02, Q-DTE-12 is substantially the same as the method of reconciling the FAS 106 Transition Obligation presented by Mr. Effron. The only differences are that the Unrecognized Gains are stated as of January 1, 1998 rather than as of the date of divestiture and that the calculations reflect the full amounts of all the Unrecognized Gains allocable to WMECO, rather than only the portion of the

Unrecognized Gains associated with the July 1999 divestiture. The Attorney General submits that the adjustment proposed by Mr. Effron is correct and the Department should reconcile the Company's FAS 106 Transition Obligation as calculated by Mr. Effron. Exh. AG-1, pp. 11-12.

C. FAS 87

In addressing the credit to the transition charge for pension over-funding (FAS 87), WMECo argues that:

(1) the Attorney General relied on something other than an actuarial study in calculating the FAS 106 reconciliation;
(2) the Attorney General is seeking to "raid the pension fund by stripping away the total unrecognized gain";
(3) the FAS 87 unrecognized gain should remain entirely with the distribution function; and,
(4) it is improper to rely on the FAS 87 unrecognized gain as of a point in time, because the balance of the unrecognized gain may fluctuate.

Co. Br., pp. 18-23.

The Company asks the Department to rely on the calculation of the credit to the transition charge prepared by Hewitt Associates, stating that this "represents the best judgment of the expert actuaries." Co. Br., pp. 19-20. However, this statement is not supported by the record. The actuaries themselves admitted that they found the instructions for calculating the adjustment "somewhat vague" and described their approach as only a "first interpretation" and requested "latitude to apply some other approaches" Tr. 1, pp. 56-57. The Company's own witness, Mr. Baumann, stated that he did not even know "for certain" whether the Hewitt study purported to address the Department ruling in D.T.E. 97-120 at all. Tr. 1, p. 51. Given this record, WMECo's conclusion that the Hewitt calculation of the FAS 87 reconciliation adjustment as the "best judgment of the expert actuaries" is without support.

WMECo argues that Mr. Effron proposes to adjust the pension expense in this case[3] without the benefit of an actuarial study and that this position "is at odds" with his prior testimony in other proceedings that pension expense should be adjusted based only on an actuarial study. Co. Br., pp. 20-21. However, a review of the record demonstrates that Mr. Effron's testimony in this case is completely consistent with the prior testimony cited by the Company.[4] Mr. Effron took the "unrecognized transition obligation, prior service cost and the unrecognized gains or losses" as of July 23, 1999 directly from the actuarial study prepared by Hewitt Associates in Exh. AG-1-05. This source is clearly designated on Exh. AG-2, at Exhibit DJE-1R, Page 3 and is the same actuarial study relied on by the Company. However, unlike the Company, Mr. Effron used the actuarial study to implement the explicit directives of the Department to credit the transition charge for pension over-funding.[5]

[3] Mr. Effron is not, of course, proposing to adjust pension expense in this case. He is proposing an adjustment to the transition charge based on the FAS 87 unrecognized gain attributable to generation Here again, the Company confuses financial accounting requirements with regulatory cost recovery.

[4] When arguing that an expert witness's testimony in a particular case is inconsistent with testimony in prior cases, it is the usual practice to confront the witness with the alleged inconsistency on the record. The Company's claimed inconsistency is of no relevance to this case since the witness was not cross examined with his prior statement during the hearings in this case, and had no opportunity to explain the particular facts and circumstances of the other proceeding. *See Hubley v. Lilley*, 28 Mass. Ap. Ct. 468, 473 (1990) (witness who has been presented with prior inconsistent statement must be afforded the opportunity to explain or elaborate on the alleged inconsistencies on redirection examination). Since the Company did not cross-examine Mr. Effron on this point during the hearings, despite access to Mr. Effron's transcripts prior to the hearings, the Department should disregard this attempted attack on the Attorney General's witness as untimely and contrary to well recognized notions of fair play.

[5] Indeed, WMECo's reveals the true objective in quantifying its preferred adjustment in the footnote on page 19 of its brief: "Mr. Stack testified that because the amounts at question here were not material, the credit did not pose a problem in this proceeding. Tr. 1, pp. 92-94." Co. Br., p. 19. In other words, the Company has no problem so long as the adjustment to the transition charge for the FAS 87 reconciliation is "not material". Conversely, any adjustment that is material would "pose a problem" to

The Company attempts to relitigate issues from its restructuring case, D.T.E. 97-120. WMECo maintains that the FAS 87 issue is really a distribution rate issue that has no place in this transition charge proceeding. Co. Br., pp. 21-22. The Company made the same argument in D.T.E. 97-120, in contending that <u>none</u> of the FAS 87 unrecognized gain should be allocated to the transition charge. D.T.E 97-120, pp. 70-71. Now the Company is using this claim to argue that <u>almost none</u> of the FAS 87 unrecognized gain should be allocated to the transition charge. The Department rejected the Company's position in D.T.E 97-120, and the Company has presented no reason why the Department should reconsider that decision in this case.

Next the Company argues that "[t]he Attorney General advocates raiding the pension fund by stripping away the total unrecognized gain" and that "[t]he fact that there is an unrecognized gain as of July 23, 1999 is a positive development but it does not tell us where the fund stands today or where it will stand over time." Co. Br., pp. 22-23. Once again the Company seeks to relitigate the same claims it made in D.T.E. 97-120 by arguing that none of the FAS 87 unrecognized gain should be allocated to the transition charge. D.T.E 97-120, p. 69. The Department rejected the Company's position in D.T.E 97-120 and the Company has presented no reason for the Department to revisit these findings here.

WMECo claims that it is the Attorney General's position that the pension fund should be adjusted downward for one employee by more than $800,000. Co. Br., p. 24. This argument too is not based on the record. The "over $800,000" to which WMECo refers is the $801,000 gain created

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WMECo in this proceeding. The objective for Hewitt Associates then was to develop an adjustment in an amount that was not material. However, the Department did not include such a restriction on materiality in establishing the criteria for the FAS 87 reconciliation adjustment.

by moving from the projected benefit obligation ("PBO") to accumulated benefit obligation ("ABO") and is clearly described as such in the Attorney General's Brief at page 12. The one employee to whom WMECo refers is the additional employee affected by moving from the PBO to the ABO that Mr. Effron took into account in his calculation. This increased the number of employees affected by move from the PBO to the ABO from 31 to 32 and increases the PBO to ABO adjustment from $776,000 (Exh. AG-1-05, p.7) to $801,000, (Exh. AG-2, at Exhibit DJE-1R, Page 3) an increase of $25,000.

The Company attempts to support its position that its adjustment complies with the Department directive by pointing out that the actuarial study on which it relies takes into account the "unrecognized gain and loss," the "prior service cost" and the "funded status" (unrecognized obligation), referring to first column of page 7 of the actuarial report prepared by Hewitt Associates. (Exh. AG-1-5); Co. Br., p. 25. Unfortunately, WMECo's proposed reconciliation adjustment uses the figures from the fourth column, not the first column, of the referenced actuarial report. On the other hand, Mr. Effron based his adjustment on the figures in the second column, which is the first column updated to July 23, 1999, further rebutting the Company's claim that Mr. Effron did not use the latest actuarial study as the basis for his adjustment. (Compare Exh. AG-1-05, Page 7, Column 2, to Exh. AG-2, at Exhibit DJE-1R, Page 3, first 3 lines under FAS 87.)

WMECo continues to argue that no allocation of the net unrecognized gain from NUSCo should be included in the 1999 reconciliation. However, the language from the Department's Order is clear that the adjustment "shall include the appropriate allocations from NUSCo and NNECo." D.T.E 97-120, p. 71. The Attorney General explained on Brief why it is appropriate to allocate a portion of the unrecognized gain from NUSCo in the 1999 reconciliation and will not repeat that explanation here. AG Br., pp. 14-16. The Company relies on the point that no NUSCo employees were transferred with the generation units in support of its position that there should be no allocation of the net unrecognized gain from NUSCo. As stated in the initial brief, this point is irrelevant, but were it relevant, the significant reduction in NUSCo employees concurrent with the restructuring would necessitate the same sort of adjustment as would a direct transfer of employees. [6] Id.

The Company concludes its argument on this issue by stating that "the Attorney General has produced no actuarial study to justify" his proposed reconciliation adjustment. In fact, Mr. Effron's proposed adjustment is based on the "Reconciliation of Funded Status" of the FAS 87 pension obligation as of July 23, 1999 prepared by Hewitt Associates. Mr. Effron applied this study exactly as directed by the Department, taking into account the "unrecognized transition obligation, prior service cost and the unrecognized gains or losses" as of July 23, 1999, the date of the fossil/hydro divestiture. Hewitt Associates went on to manipulate the results of this study in a way not contemplated by the Department in D.T.E. 97-120 in order to derive an adjustment that is "not material"in the Company's opinion. Thus, neither Hewitt Associates nor the Company's own witness could represent that the adjustment calculated by Hewitt does, in fact, comply with the Department's Order. Tr. 1, pp. 50-51.

D. INVESTMENT TAX CREDITS

Deferred investment tax credits ("ITC") represent the value of earlier reductions to the

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[6] The Company's "argument" that the 25% reduction of NUSCo employees is unrelated to the divestiture of its generation business is simply not credible. If the Department were to accept this assertion, then NUSCo's abject inefficiency warrants a full Department investigation of its operations.

Company's actual income tax expense that have not yet been flowed through to ratepayers. As such, ITCs should be returned to customers. The Legislature did not envision that restructuring would provide utilities with an opportunity to keep funds which they otherwise would have had to credit back to customers. No other Massachusetts utility has kept generation-related ITCs and the Department should reject any attempt by WMECo, the Company with the highest transition charge, to keep for itself amounts which should be credited to the millions of dollars of unrecovered transition costs.

In support of its arguments to keep the benefits of the ITCs, the Company argues that "a reduction to rates would result in negative consequences to WMECO and its customers." Co. Br., p. 28. However, the Company has not explained how there would be negative consequences to customers. Assuming, *arguendo*, that the IRS were to find that continuing the amortization of the ITC was not consistent with the normalization requirements of the Internal Revenue Code (as unlikely as this might be), the penalty for such a violation would be recapture of unamortized ITC, a "penalty" that would leave the Company exactly where it is with its own proposal – that is, with no ITC to amortize as a credit to the transition charge. Tr. 2, pp. 270-271. The only negative consequences to customers result from the WMECo proposal. The Company would capture for itself amounts that heretofore have been used to reduce the amortization of regulatory assets recovered through the transition charge. Exh. WM-1, at Exhibit RAB-4, p. 6.

WMECo maintains that it made its position on this issue clear, asserting that it "stated in response to an Attorney General data response [sic]: 'upon disposition of the fossil/hydro generating assets, WMECO will cease crediting customers (through the transition charge) for the fossil hydro portion of Accumulated Deferred ITC as continuing to credit would violate the ITC normalization rules'. Exh. AG-2-32 (containing WMECO response to information requests AG-5-65 in D.T.E. 97-120)." Co. Br., p. 29. However, the quoted statement from D.T.E 97-120 was made in response to a Department data request, DTE-05-065, not AG-5-65, in that case. As the accounting for the divestiture was not before the Department in D.T.E. 97-120, there would have been no reason to investigate this issue at that time.

No other regulatory commission has agreed with WMECo's view of this issue. The Company's characterization that "New Hampshire, a state that has ruled on the issue, has agreed with Mr. Stack that it would be an ITC violation to continue to provide ITC credits to customers" is dubious, at best. Co. Br., p. 29. An actual review of Order No. 23,549 by the New Hampshire Public Utilities Commission does not support the Company's, or Mr. Stack's, interpretation. (HD-02, Q-DTE-004); Exh. RR-4. This order at page 53 refers only to the "loss of the use of accelerated depreciation," which would imply the Public Utilities Commission was not addressing ITC matters, and only finds that "While it may be possible that such a result may not actually occur, the risk exists." The Public Utilities Commission then finds intervening events have, in effect, made the matter moot and does not make a finding on the ITC issues addressed by Mr. Stack. Id. To conclude New Hampshire has agreed with Mr. Stack that it would be an ITC violation to continue to provide ITC credits to customers requires a tremendous leap of faith, a leap that the Department should not be willing to take.

WMECo continues to make much of Private Letter Rulings ("PLR") that it claims supports its position. However, it must be reiterated that a PLR, as a matter of law, is nothing more than an advisory communication to the party requesting the ruling. It is not binding on anyone other than the requesting taxpayer. In fact, when asked, Mr. Stack was unable to state that the IRS itself is bound by opinions expressed in PLRs. Exh. AG-5-7 The Department should not rely on one PLR directed to another taxpayer, especially when there has been no showing that the circumstances of that taxpayer is the same as those of WMECo.

WMECo also attempts to create the impression that the Attorney General is advocating that WMECo try to slip in under the radar, so to speak, by continuing to amortize the investment tax credits and hope that the IRS doesn't notice. Nothing could be further from the truth. Mr. Effron cited the examples for two reasons: first, to establish that there are other companies who do not share WMECo's interpretation of the Internal Revenue Code's normalization requirements; and second, that there are other companies who feel some obligation to treat ratepayers fairly with regard to the amortization of investment tax credits. It is difficult to take seriously WMECo's speculation that Fitchburg Gas and Electric Light Company and Montaup Electric Company might have continued to flow the amortization of investment tax credits back to the benefit of customers only to then turn around and self-assess an ITC violation. Co. Br., p. 34. Most importantly, WMECo has not offered the Department any reason why WMECo should keep for itself what Montaup and Fitchburg are crediting to customers. WMECo has an obligation to mitigate its transition costs just like the other Massachusetts utilities have done on this issue.

Equally without merit is the Company's speculation that "there are any number of reasons that those companies may have proceeded in a particular manner (*e.g.*, side agreements with the parties in their particular proceedings) that are not in the record of this proceeding and that the parties to this proceeding will never know." Co. Br., p. 35. The testimony by Montaup in FERC Docket No. ER99-1813-000 is included in Exh. AG-2 as Attachment 1. What Montaup did is there for everyone, including the IRS, to see. There is no mention of any "side agreement" or any *quid pro quo* for Montaup's treatment of ITC. Similarly, Fitchburg's treatment of the ITC is matter of record to the Department. The Company has not provided documentation to support its allegations. *See* Exh. WM-1-23.

WMECo also mischaracterizes Mr. Effron's testimony regarding other utility companies' treatment of ITC. WMECo contends that "[a] late claim to try to buttress the Attorney General's weak arguments with respect to ITC, a claim that was not made in either Mr. Effron's direct or surrebuttal testimony, and which was aired only on the last day of Mr. Effron's testimony, was that New England Power Company and Boston Edison Company also provided a credit for ITC." Co. Br., p. 35. Mr. Effron's testimony was offered in response to questions that were directly posed to him on cross-examination, in the first case by the bench (Tr. 2, p. 271-272) and in the second case by WMECo itself (Tr., 2, p. 285). Further, WMECo's contention that "Mr. Effron did not testify to this of his own knowledge but was relying on others in the Attorney General's office" with regard to the treatment by New England Power Company (Co. Br., p. 35) is simply not accurate and is not supported by the record cited by WMECo. As Mr. Effron testified, he is familiar "of his own knowledge" with what New England Power Company did. Tr. 2, pp. 271-272. Mr. Effron described what the other companies did in responses to questions that were posed to him on cross-examination. WMECo then asked Mr. Effron for documentation to be provided to support his description of what these other companies did. Tr. 2, p. 285. The Attorney General provided the requested documentation to the Company. Exh.-RR-15. The record establishes that all other Massachusetts utilities have flowed back their ITCs to customers and that WMECo should not be allowed to keep credits that would have gone to its customers but for restructuring.

E. TARIFF T-9 CHARGES

The Company's brief creates a fundamental misimpression regarding the $2.5 million that it received for the sale of its fossil/hydro plants but deducted from the proceeds and allocated to transmission revenue: that this payment was for actual transmission service. (See, for example, Co. Br., p. 48, where WMECO likens the payment for T-9 transmission access to the cost associated with transmitting power.) The $2.5 million was not for actual transmission service but for a newly created "intangible right" (the Company's own term) of access to the transmission system which, in the context of this case, is a device for the Company to divert $2.5 million of the proceeds from the sale of generating units to its own pocket, rather than putting the $2.5 million to its rightful use – mitigating the transition charge.

It must be emphasized that the only mention of the allocation of the purchase price to this "intangible right" in the Purchase and Sale Agreement is in the paragraph addressing the allocation for income tax purposes, consistent with "Section 1060 of the (Internal Revenue" Code and the Treasury Regulations thereunder." Exh. AG-3-10 (Bulk), Section 2.7 and Second Amendment. There is no other mention of the allocation of the $2.5 million. It was the clear intent of the parties that this allocation is for income tax purposes only, and the amount allocated was not a prepayment for any actual service.

As the Company has noted, "Mr. Baumann testified that it is not unusual for a purchaser to make a payment for transmission rights to access the PTF system at the time of purchase that is considered separate and distinct from the payment for generation." Co. Br., p. 46. However, neither Mr. Baumann, nor WMECo has cited any examples of any other companies in Massachusetts deducting an allocation to an intangible right to transmission access from gross divestiture proceeds in calculating the net proceeds from divestiture.

F. MADISON AND OTHER CONTRACT SALES

The Company makes two arguments on brief in support of its position to retain the margins on its Madison and other wholesale contracts. First, it argues that the Attorney General should have raised this issue in D.T.E. 97-120, the Company's original restructuring proceeding and second, it claims that "all of the costs and revenues" related to these contracts were removed from rates by Mr. Baumann so that customers are "insulated" from the contract. Co. Br. Pp. 37-44. As will be discussed below, both of these arguments cannot withstand scrutiny.

In the context of the administrative setting before the Department, there has been no finality to WMECo's reconciliation proceedings of the type that would allow the Company to avoid mitigation of the Madison and other contracts by finding shelter under the doctrine of *res judicata,* and its embodied principles of claim preclusion and issue preclusion. First, Company proposes a more inflexible application of *res judicata* than the Supreme Judicial Court permits the Department to follow:

> A party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions. ***This does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata***, but neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time it is presented. Davis, Administrative Law Treatise, ss 17.01, 17.07, 18.01, and 18.02 (1958 and

1970 Supplement) [emphasis added].

Boston Gas Company v. Department of Public Utilities, 367 Mass. 92, 104 (1975). The appropriate standard for the Department to follow in this case is more akin "reasoned consistency" than a rigid application of *res judicata.* The fact that a specific element of transition cost mitigation, such as the revenues from contract sales, did not arise in the Company's original restructuring plan does eliminate the Company's statutory duty imposed by the Legislature to mitigate continually those costs as under the Restructuring Act. G.L. c. 164, §1. The Company is under an ongoing obligation to maximize mitigation of these costs whether that is from profitable generation sales or asset sales. Maximum mitigation is not, and cannot be, a one time event. Given the Department's treatment of other restructuring issues in D.T.E. 97-120 and the statutory duty to mitigate, it would be reasonably consistent for the Department to permit mitigation of the Madison and other contracts in this docket.

Second, the very nature of a reconciliation filing implies broad powers for the Department to review earlier filings to ensure compliance with the appropriate statutory mandates. *Automobile Insurance Bureau of Massachusetts v. Commissioner of Insurance*, 425 Mass. 262, 265 (1997); *See generally Fitchburg Gas and Electric Light Company,* D.T.E. 99-66-A. "In the absence of express or perceived statutory limitations, administrative agencies possess an inherent power to reconsider their decisions." *Stowe v. Bologna*, 32 Mass. Ap. Ct. 612, 615 (1992) *affirmed*, 415 Mass. 20 (1993).[7]

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[7] Although WMECo cites the Supreme Judicial Court decision in *Stowe* and other cases on *res judicata* principles, WMECo does not bother to distinguish those decisions where a case is still before an agency from those where a separate civil court action has been filed collaterally attacking an agency's decision. Co. Br., pp. 38-39. Most, if not all, of the decisions relied upon by the Company involve the situation where a separate court action seeks to collaterally attack a previous agency or court decision,

Issue preclusion requires the actual litigation of the exact matter in question in a previous case. Since the Company freely admits on brief that the Madison contracts were not addressed in D.T.E. 97-120, WMECo cannot successfully avail itself of this doctrine to prevent consideration in this docket. Since claim preclusion is grounded upon considerations of fairness and efficient judicial administration, the doctrine is not applied rigidly where such interests would not be served. *Loring v. Marshall*, 396 Mass. 166, 175-176 (1985) (O'Connor J., dissenting). As to the "fairness element" the Company simply ignores any notion of fairness and equity to its customers by seeking to claim all of the margins. Under the circumstances of this case, the Department has the ability to address the Madison and other contracts.

The Company's assertion that the Department has already ruled on the appropriate treatment of the Madison contract in the calculation of generation operating costs is not supported by the record. Co. Br., p. 38. The Department could not have addressed the treatment of the Madison contract in D.T.E. 97-120, because the issue was not before the Department in that case. As Mr. Effron explained, the format used by the Company to calculate the generation operating costs in D.T.E. 97-120 was different from the format used in the present case, and the treatment of the Madison contract was irrelevant to the calculation of the generation operating costs presented by the Company in D.T.E. 97-120. Tr. 2, p. 280.

Comparison of Exhibit 13EC, Schedule 1, Page 3A of the compliance filing by WMECo in D.T.E. 97-120 to Exh. WM-1, Exhibit RAB-4, Page 3A in the present case reveals how the Company

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rather then the situation, as presented here, where the agency itself continues to examine an issue.

has changed its calculation of generation operating costs. In particular, there were no line items for "Bulk Revenues" or for the elimination of "Madison/Other Costs" in Exhibit 13EC, Schedule 1, Page 3A of the compliance filing by WMECo in D.T.E. 97-120. These are the line items on Exh. WM-1, Exhibit RAB-4, Page 3A relevant to the treatment of the Madison/Other Revenues and Madison/Other Costs in the present case. As the Madison/Other Revenues and Madison/Other Costs were completely absent from the calculation of generation operating costs in D.T.E. 97-120, the Department could not possibly have addressed this issue in that case.

The Company also claims, on brief, that "all of the costs and revenues" related to these contracts were removed from rates and, therefore, customers shouldn't receive the benefits from the margins Co. Br., p. 42. However, the Company's own witness testified that in fact all costs associated with the contracts were not back out of retail customers:

> Q. To the extent that WMECo resources are used to generate these sales, is there an allocation of the fixed costs of WMECo resources to these sales?
>
> A. [BAUMANN] Again, no.

Tr. 1, p. 66. Retail ratepayers were not "insulated" from either the capacity costs associated with Madison/Other contracts or the indirect costs associated with all of these wholesale contracts before restructuring.

For all of these reasons, the Department should order the Company to flowback all of the wholesale contract margins to customers through the transition charge in order to balance customer risks and rewards.

G. CAPITAL STRUCTURE

The Company, in its argument against the Attorney General's proposal to update the capital structure to include short-term debt, states "The Attorney General claims, without any foundation or basis, that WMECO's capital structure in 1999 was 'less than the amount needed to finance the Company' ". Co. Br., p. 51. The Company's statement is wrong. The foundation and basis for this claim is the direct testimony by Mr. Effron (Exh. AG-1, p. 30), which the Attorney General clearly cites at Page 21 of his Brief. That WMECo chose not to rebut, cross-examine, or otherwise challenge this testimony on the record certainly does not make it any less true.

The Company's argument that Mr. Effron's testimony here is inconsistent with prior testimony because he did not "take issue" with the reasonableness of a capital structure with 45% common equity for a fully integrated electric utility six years ago is similarly without basis. Co. Br., p. 51. The Company has not even established that there was any short-term debt outstanding to be included in the capital structure in the cited case.

H. FAS 106 DOUBLE COUNTING

The Company denies that there is a return on the FAS 106 balance included on Exh. WM-1, Exh. RAB-4, Page 3A; Co. Br., p. 55. WMECo does not dispute that Page 3A includes administrative and general costs, which in turn include FAS 106 expense. However the Company apparently believes "There is no indication that these amounts developed for financial statements, including an amount for the recovery of the FAS 106 balance, earn any return." Co. Br., p. 56. In fact, there is just such an "indication", which can be seen by referring to WMECo (as well as NUSCo and NNECo) financial statements. The footnotes to the financial statements show the components of the FAS 106 expense. Included in the components of the Post Retirement Benefits expense is the "Interest Cost". Exh. AG-2-2, WMECo 1999 Annual Report, Page 32. The "Interest Cost" is the return on the Accumulated Benefit Obligation. WMECo has not presented any evidence that this return component was somehow removed from the FAS 106 expense included in administrative and general expenses on Exh. WM-1, Exhibit RAB-4, Page 3A. Thus, the expenses included in the generation operating costs do include a FAS 106 return, and to achieve a complete elimination of the double counting, the return component on the FAS 106 balance for 1998 and 1999 must be eliminated.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Attorney General urges the Department to approve only recovery of transition charge costs consistent with the arguments set forth herein.

Respectfully submitted,

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